82-889

No. ——

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OVERHEAD DOOR COMPANY OF METROPOLITAN WASHINGTON,
Petitioner,

v.

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN J. ROSS *
WENDY T. KIRBY
PAUL C. SKELLY
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a prehire agreement authorized by Section 8(f) of the National Labor Relations Act is enforceable in a suit brought by the trustees of union fringe benefit funds against an employer in the construction industry, absent a showing that the union represents a majority of the employer's employees.

PARTIES TO THE PROCEEDINGS

Appellee below and Petitioner in this Court is Overhead Door Company of Metropolitan Washington. Appellants below and Respondents in this Court are Washington Area Carpenters' Welfare Fund, Washington Area Carpenters' Pension and Retirement Trust Fund, Washington Area Carpenters' Apprenticeship Plan, and Washington Area Carpenters' Trust Funds.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	7
APPENDICES:	
APPENDIX A—Court of Appeals Opinion	1a
APPENDIX B—Court of Appeals Order accompanying Opinion	20a
APPENDIX C—District Court Judgment	21a
APPENDIX D—District Court Memorandum Opinion	22a
APPENDIX E—Amendment to District Court Memorandum Opinion	30a
APPENDIX F—Court of Appeals Judgment	31a
APPENDIX G—Court of Appeals Order denying Petition for Rehearing and Suggestion for Rehearing *En Banc*	32a
APPENDIX H—Affidavit of Richard F. Ayres (May 16, 1979)	33a
APPENDIX I—Affidavit of Richard F. Ayres (June 4, 1979)	36a
APPENDIX J—Relevant Statutes	38a

TABLE OF AUTHORITIES

Cases	Page
Kaiser Steel Corp. v. *Mullins*, 102 S.Ct. 851 (1982)	4
N.L.R.B. v. *Local Union No. 103, International Association of Iron Workers*, 434 U.S. 335 (1978)	4, 6
Todd v. *Jim McNeff, Inc.*, 667 F.2d 800 (9th Cir.), *cert. granted*, 102 S.Ct. 3508 (1982) (No. 81-2150)	2, 5, 6
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982)	2, 3, 4, 5, 6
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1981), *rev'd*, 681 F.2d 1 (D.C. Cir. 1982)	2, 4

Statutes	
28 U.S.C. § 1254(1)	2
29 U.S.C. § 158(f)	1
29 U.S.C. § 185	4, 5
29 U.S.C. § 1132(f)	4
29 U.S.C. § 1145	4

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METROPOLITAN WASHINGTON,
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v.

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Overhead Door Company of Metropolitan Washington prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which held that a "prehire" agreement between an employer and union in the construction industry, as authorized by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), may be enforced retrospectively, even though the union has not attained the status of majority representative of the employer's employees.

OPINIONS BELOW

The judgment and memorandum opinion of the United States District Court for the District of Columbia (No.

79-0097), dated April 22, 1980, appear as Appendix C (App. 21a) and Appendix D (App. 22a) hereto. The District Court's memorandum opinion is reported at 488 F. Supp. 816. An amendment to the District Court's memorandum opinion, dated May 5, 1980, is incorporated in the reported opinion at 488 F. Supp. 816 and appears as Appendix E (App. 30a) hereto. The opinion of the United States Court of Appeals for the District of Columbia Circuit (No. 80-1501, from which certiorari is sought, dated June 15, 1982, is reported at 681 F.2d 1 and appears as Appendix A (App. 1a) hereto. The order of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing *En Banc*, dated August 30, 1982, is not reported but appears as Appendix G (App. 32a) hereto.

JURISDICTION

The Court of Appeals' judgment in this case was rendered on June 15, 1982. Appendix F (App. 31a). A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on July 12, 1982, and denied on August 30, 1982. Appendix G (App. 32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix J (App. 38a) hereto.

STATEMENT OF THE CASE

The issue presented in this case—whether a prehire agreement is enforceable absent a showing that the union which signed the agreement is the majority representative of the employer's employees—is virtually identical to the issue which this Court has agreed to review in *Jim McNeff, Inc.* v. *Todd, cert. granted*, 102 S.Ct. 3508 (1982) (No. 81-2150) (*"McNeff"*). The facts of this case closely resemble those in *McNeff*.

Petitioner Overhead Door Company of Metropolitan Washington (the "Employer") is an employer in the construction industry. In October, 1969, two of the Employer's employees were working on a construction project in Laurel, Maryland, for which the Employer was a subcontractor. A representative of the Carpenters' Union (the "Union") came to the job site and told the two employees that the Employer would have to sign a contract with the Union in order to finish the job. Appendix H (App. 34a). In addition, the Employer's president was told that the Union would "kick him off the job" unless he signed a contract and forced the two employees to join the Union. Appendix I (App. 36a). The Employer's president thereafter executed an "Acceptance Agreement" incorporating the terms of the area-wide collective bargaining agreement between the Construction Contractors Council, Inc. and the Carpenters' District Council, and the two employees joined the Union. Although fifteen of the Employer's employees were engaged in carpentry work at that time, only one was a member of the Union. (App. 34a). The Union did not contend that it represented a majority of these employees, and no election was ever held to establish the employees' desires. (App. 37a). The Employer's president signed similar Acceptance Agreements presented to him by the Union in 1972 and 1976. (App. 35a).

As noted by the Court of Appeals (App. 3a), the parties are in agreement that these Acceptance Agreements, which cover all terms and conditions of employment for carpentry services, were "prehire" agreements, as that term is commonly defined in the construction industry. These prehire agreements called for the Employer to make contributions on behalf of covered employees to certain union fringe benefit funds (the "Funds"). The Employer made such contributions to the Funds for hours worked by the three employees who were members of the Union. The Employer did not make contributions, however, for other employees who were

not members of the Union, and none of those other employees ever made a claim for benefits from the Funds. (App. 37a).

On January 9, 1979, trustees of the Funds brought this action against the Employer in the United States District Court for the District of Columbia, pursuant to Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, and Section 502(f) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(f). The trustees alleged that the Employer had violated the terms of the prehire agreements by underpaying contributions for its Union employees and failing to make any contributions for its non-Union employees. The trustees sought monetary damages and an audit of the Employer's records to determine the amount of underpayment.

On April 22, 1980, the District Court granted summary judgment for the Employer, holding that the prehire agreements were not enforceable absent proof of majority support for the Union among the employees. (App. 27a). In reaching its decision, the District Court relied heavily on this Court's decision in *N.L.R.B.* v. *Local 103, International Association of Iron Workers*, 434 U.S. 335 (1978) (*"Iron Workers"*).

On June 15, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's entry of summary judgment. The Court of Appeals concluded that the *Iron Workers* decision was not controlling, and ruled that a prehire agreement is enforceable by breach of contract actions until such time as either party manifests its intent to void the agreement. (App. 14a).[1]

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[1] The Court of Appeals expressly declined to base its holding on the trustees' argument that the combined effect of Section 306 of the Multiemployer Pension Plan Act of 1980, 29 U.S.C. § 1145, and this Court's recent opinion in Kaiser Steel Corp. v. Mullins, 102 S.Ct. 851 (1982) precludes an employer from raising an unenforceability defense based on the absence of majority support. (App. 8a).

ARGUMENT

A brief review of the Court of Appeals' decision in *McNeff* demonstrates how closely it resembles the present case. *See Todd* v. *Jim McNeff, Inc.*, 667 F.2d 800 (9th Cir.), *cert. granted*, 102 S.Ct. 3508 (1982) (No. 81-2150). In that case, the president of a construction company signed a prehire agreement under pressure from a union representative. When the company failed to comply with the terms and conditions of the prehire agreement, it was sued by the trustees of a number of union fringe benefit trust funds under Section 301 of the LMRA. The company raised a defense that the agreements were unenforceable absent a showing that the union had gained majority support among the employees. This defense was ultimately rejected by the Ninth Circuit, which ruled that prehire agreements are enforceable until repudiated by the employer. 667 F.2d at 804.

In the decision below in the present case, the Court of Appeals expressly stated that "[t]he reasoning [of the Court of Appeals decision in *McNeff*] is the same as we announce today." (App. 17a at n.41). Thus, the issue presented in this case is virtually identical to that which this Court has already agreed to review in *McNeff*.[2]

The issue of the enforceability of prehire agreements is one of great concern in the building and construction industry. It affects the interests of employees, employers, unions and union benefit funds across the nation. The Employer believes that the approach adopted by the Court of Appeals below, as well as by the Ninth Circuit in *Mc-*

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[2] *McNeff* also presents for the Court's consideration a second, closely related question—whether a prehire agreement may be enforced if it was entered into by an employer because of coercion by a union. Because the District Court's summary judgment was not grounded upon any finding of coercion, this precise issue was not argued to the Court of Appeals in the present case, although the facts underlying this case do reflect an element of union coercion. Thus, it is not raised as a separate question herein.

Neff, is plainly incorrect. This point is explained fully by the arguments set forth in the Brief of Petitioner on the Merits filed in *McNeff*. Thus, in the interests of avoiding redundancy and an unnecessary expenditure of the Court's time, the Employer will not repeat those arguments herein, but rather will briefly set forth the factors justifying the issuance of a writ of certiorari.

First, the decision below calls into question and undermines this Court's decision in *N.L.R.B.* v. *Local 103, International Association of Iron Workers*, 434 U.S. 335 (1978) ("*Iron Workers*"). The District Court's entry of summary judgment in favor of the Employer was based on its conclusion that under *Iron Workers*, prehire agreements are unenforceable absent a showing that the union has attained majority support. (App. 27a). The Court of Appeals concluded, however, that *Iron Workers* was not controlling and that the prehire agreements in question were enforceable retrospectively. (App. 14a). Thus, the Court of Appeals' decision below is plainly contrary to the position established by this Court in *Iron Workers*.

Second, the Court of Appeals' decision in this case merely adds to the considerable conflict among the United States Courts of Appeals on the issue presented by this case. As noted by the Ninth Circuit in *McNeff*, three different approaches have been adopted to date. 667 F.2d at 802-03. The passage of time has resulted in further confusion rather than clarification of the law. This widespread division of opinion on an important issue of federal law warrants prompt resolution by this Court.

CONCLUSION

For the reasons set forth above, the Employer respectfully requests that this Court issue a Writ of Certiorari to review the decision below of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JOHN J. ROSS *
WENDY T. KIRBY
PAUL C. SKELLY
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Petitioner

* Counsel of Record

INDEX TO APPENDIX

	Page
APPENDIX A—Court of Appeals Opinion	1a
APPENDIX B—Court of Appeals Order accompanying Opinion	20a
APPENDIX C—District Court Judgment	21a
APPENDIX D—District Court Memorandum Opinion	22a
APPENDIX E—Amendment to District Court Memorandum Opinion	30a
APPENDIX F—Court of Appeals Judgment	31a
APPENDIX G—Court of Appeals Order denying Petition for Rehearing and Suggestion for Rehearing *En Banc*	32a
APPENDIX H—Affidavit of Richard F. Ayres (May 16, 1979)	33a
APPENDIX I—Affidavit of Richard F. Ayres (June 4, 1979)	36a
APPENDIX J—Relevant Statutes	38a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1501

WASHINGTON AREA CARPENTERS' WELFARE FUND, ET AL.,
Appellants

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON

Appeal from the United States District Court
for the District of Columbia

Argued 14 May 1981

Decided 15 June 1982

Joseph Semo, with whom *Ira M. Lechner* was on the brief, for appellants.

William T. Torgerson, with whom *John J. Ross* and *Wendy T. Kirby* were on the brief, for appellee.

Gerald M. Feder, *Robert J. Connerton* and *Theodore T. Green* were on the brief for *amicus curiae*, National Coordinating Committee for Multiemployer Plans, urging reversal.

Laurence J. Cohen and *Terry R. Yellig* were on the brief for *amicus curiae*, Building and Construction Trades Department, AFL-CIO, urging reversal.

Gerard C. Smetana and *William H. DuRoss, III* were on the brief for *amicus curiae*, Associated Builders and Contractors, Inc., urging affirmance.

Before: ROBINSON, *Chief Judge*, HOMER THORNBERRY,* *Senior Circuit Judge*, and WILKEY, *Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: This is an appeal of the district court's grant of summary judgment in favor of appellee Overhead Door Company of Metropolitan Washington. Appellants, union fringe benefit funds ("the Funds"), brought suit in January 1979 to recover contributions Overhead Door allegedly owed the Funds under successive agreements with the Carpenters' District Council Washington, D.C. and Vicinity ("the Union"). Overhead Door argued that these "prehire" agreements, made pursuant to section 8(f) of the National Labor Relations Act (NLRA),[1] were not enforceable because the Union never gained majority support of the bargaining unit. The district court agreed, and entered summary judgment against the Funds. We reverse.

I. BACKGROUND

Section 8(f) of the NLRA provides that it shall not be an unfair labor practice for construction industry unions and employers to make agreements (called "prehire" agreements), even though the union has not attained majority status among the workers.[2] This exempts construction industry employers from the normal rule that bargaining with anyone other than the majority representative is an unfair labor practice.[3] Once

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* Of the United States Court of Appeals for the Fifth Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

[1] 29 U.S.C. § 158(f) (1976).

[2] *Id.*

[3] *See International Ladies' Garment Workers Union* v. *NLRB*, 366 U.S. 731, 737-38 (1961).

the union gains majority support, the prehire agreement matures into a fully effective collective bargaining agreement.[4] The status of a prehire agreement prior to that time is the issue in this case.

In 1969 an area-wide collective bargaining agreement existed between the Union and the Construction Contractors Council, Inc. of Washington, D.C., an employers association. Overhead Door was not a member of the Contractors Council and thus not a party to the agreement. According to the president of Overhead Door, in October 1969 the company was told by the Union's representative that to complete a job it was working on as a subcontractor it would have to sign an agreement with the Union, and its two employees working on the job would have to join the Union.[5] These workers complied, leaving Overhead Door with three Union members out of fifteen employees. Overhead Door also complied, entering into an "Acceptance Agreement" which incorporated the terms of the area-wide collective bargaining agreement. Similar Acceptance Agreements were signed by Overhead Door in July 1972 and December 1976, incorporating the provisions of subsequent area-wide agreements. The 1976 agreement expired in 1978, meaning that the agreements between Overhead Door and the Union were in effect for a ten-year period.

The parties agree that these Acceptance Agreements, which cover all terms and conditions of employment for carpentry services, were prehire agreements. One provision of each agreement required Overhead Door to make contributions to the Funds on behalf of all covered employees. For example, by the end of the ten-year

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[4] *See NLRB* v. *Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 341 (1978).

[5] The alleged use of threats to force Overhead Door to sign the agreement is not at issue in this case, as the company never filed an unfair labor practice charge.

period Overhead Door was required to pay, for each hour worked by each employee, $.80 per hour to the Health and Welfare Fund, $.60 per hour to the Pension Fund, and $.07 per hour to the Apprenticeship Training Fund. In 1976 the Funds conducted a partial audit of the company's records, and concluded that it had failed to make contributions for most employees and had undercounted the hours worked by the few employees for whom contributions were made.

In January 1979 the Funds brought this suit under section 301 of the Labor Management Relations Act and section 502 of the Employee Retirement Income Security Act,[6] seeking to collect the unpaid contributions. In response Overhead Door conceded that it contributed to the Funds on behalf of its three union employees, who have received some benefits from the Funds. It argued, however, that the agreements did not cover most hours worked by two of these three employees because one had not worked as a carpenter since 1969 and the other had been a supervisor since 1969. More important, the company denied responsibility for contributions based on hours worked by its nonunion employees. It claimed that it had never applied the agreements to these employees, and asserted that the agreements could not be enforced because the Union had not achieved majority status.

In April 1980 the district court granted summary judgment for Overhead Door. It determined that agreements under section 8(f) are permissible but not enforceable until the union gains majority support among the employees. The court also rejected the Funds' argument that the company was not permitted to assert the defense of unenforceability in a suit brought by the Funds, third party beneficiaries of the agreements. Since the Funds failed to establish the majority status of the Union, the agreements could not be enforced. Overhead

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[6] 29 U.S.C. § 185 (1976); *id.* § 1132.

Door was not liable for contributions on behalf of any employees, whether union or nonunion.[7]

The Funds then appealed. On 12 June 1981 this court stayed the appeal pending the Supreme Court's decision in *Kaiser Steel Corp.* v. *Mullins*.[8] In *Mullins* this court had held that in a suit brought by union funds to recover unpaid contributions, the employer could not raise the defense that the contract was illegal. The Supreme Court reversed, holding that the defense of illegality was legitimate.

Turning again to this appeal, we reverse and remand to the district court for a decision on the merits of the Funds' claims.

II. Legitimate Employer Defenses to a Trust Fund Suit to Recover Unpaid Contributions

The Funds contend that Overhead Door is not entitled to defend this suit on the basis of the alleged unenforceability of the prehire agreement. The district court rejected this argument, but the legal bases of its decision have been largely superceded by a recent Supreme Court decision and a new statutory provision dealing with this issue. We therefore must consider these new developments.

In *Kaiser Steel Corporation* v. *Mullins* the Supreme Court held that a company which had promised to contribute to union welfare funds was "entitled to plead and have adjudicated a defense that the promise is illegal under the antitrust and labor laws."[9] The collective bargaining agreement between Kaiser Steel and the United Mine Workers included a clause requiring Kaiser Steel to make contributions to union funds based on each

[7] 488 F. Supp. 816 (D.D.C. 1980).

[8] 102 S. Ct. 851 (1982), *rev'g* 642 F.2d 1302 (D.C. Cir. 1980).

[9] *Id.* at 854.

ton of coal produced and each hour worked by employees, as well as on each ton of coal purchased from another operator who did not make contributions on his production. In a suit brought by the union funds to recover the latter form of contributions, Kaiser Steel sought to raise the defense that the purchased coal clause was void and unenforceable because it violated sections 1 and 2 of the Sherman Act and section 8(e) of the Labor Management Relations Act (which prohibits "hot cargo" clauses whereby an employer agrees not to do business with another employer).[10] The district court rejected the defense and granted summary judgment for the fund trustees; a divided court of appeals affirmed. The Supreme Court reversed, holding that its cases left "no doubt that illegal promises will not be enforced in cases controlled by the federal law." [11]

The Court then turned to a statutory issue not previously addressed. On 6 September 1980, nine days after the court of appeals decision in *Mullins*, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980.[12] Section 306 of the Act provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[13]

Assuming arguendo that this new provision applied to *Mullins*, the Court determined that it did not change the result. The Act did not abolish illegality defenses, the

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[10] 15 U.S.C. §§ 1, 2 (1976); 29 U.S.C. § 158(e) (1976).

[11] 102 S. Ct. at 856.

[12] Pub. L. No. 96-364, 94 Stat. 1208.

[13] 29 U.S.C.A. § 1145 (West Supp. 1981).

Court found, but rather only unrelated or extraneous defenses. Also, finding an abolition of illegality defenses would create a partial repeal of the labor, antitrust, and other laws which might be cited as a defense to an action for collection of unpaid contributions. Since repeals by implication are disfavored, the Court found that the 1980 Act did not prevent Kaiser Steel from raising the defense of illegality.[14]

There are substantial reasons for believing that the combined effect of *Mullins* and the 1980 Act is to prohibit an employer from defending a trust fund suit on the basis of the alleged unenforceability of prehire agreements. The *Mullins* decision rested on the alleged *illegality* of the contract. Since payment by Overhead Door to the Funds pursuant to the prehire agreements would not be illegal, as allegedly would payment by a coal producer pursuant to the purchased coal clause, *Mullins* may be distinguished.[15] More important, the Court specifically cited legislative history indicating that the 1980 Act was intended to reverse the result in this very case: "Both [the House and Senate floor managers of the bill] also stated that they . . . disapproved cases such as *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*,

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[14] 102 S. Ct. at 860-62. Three Justices dissented from the Court's interpretation of the 1980 Act. *Id.* at 862 (Brennan, J., dissenting).

[15] Overhead Door argues that the principle underlying *Mullins* and § 306(a) is that defenses are permissible when they relate directly to the enforceability of the contract itself. It notes that § 306(a) provides a cause of action for employers who are "obligated to make contributions" pursuant to "a collectively bargained agreement," 29 U.S.C.A. § 1145 (West Supp. 1981), and asserts that the "obligation" is what is in dispute here. A contrary reading, however, is at least as compelling. The terms of the prehire agreements clearly do obligate the company to contribute to the Funds, and in at least one other context prehire agreements have been found to constitute collectively bargained agreements. *See Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859, 875 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

488 F. Supp. 816 (DC 1980), *appeal pending* . . . ." [16] This specific reference in the legislative history, combined with the Act's purpose of making it easier for union funds to recover unpaid contributions, provides support for a holding that Overhead Door may not defend this suit on the basis of the alleged unenforceability of section 8(f) agreements.

Nonetheless, we have determined not to resolve this case on the basis of the 1980 Act. In the first place, there is a question whether the Act applies at all here, since the Court in *Mullins* refused to hold that the Act applied to cases pending on appeal.[17] And appellants themselves have stated that the Act is not at issue in this case, instead relying on it only as evidence of a national policy in favor of enforcing contribution obligations.[18] More important, the unavoidable effect of preventing employers from raising the unenforceability defense in cases such as this one will be to make prehire agreements enforceable, at least retrospectively. There are no other means by which an employer may assert its position that section 8(f) agreements are never enforceable prior to recognition of the union as majority representative.[19]

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[16] 102 S. Ct. at 861 (citing 126 CONG. REC. H7899 (daily ed. 26 Aug. 1980) (remarks of Rep. Thompson); *id.* at S11673 (daily ed. 26 Aug. 1980) (remarks of Sen. Williams)).

[17] The majority assumed arguendo the applicability of the Act. *Id.* at 860. The dissenters argued that there was no doubt that the 1980 Act did apply to pending cases. *Id.* at 863 n.1 (Brennan, J., dissenting).

[18] *See* Reply Brief for Appellants at 6 n.12; Supplemental Brief for Appellants at 4.

[19] This is analogous to the *Mullins* majority's concern that preventing the defense of illegality would effectively create a partial repeal of the antitrust and labor laws. *See* 102 S. Ct. at 862. The dissenters disputed this, at least with respect to the antitrust laws, arguing that the employer could still sue for damages and injunctive relief under the Sherman Act. *Id.* at 866 (Brennan, J., dissent-

We prefer to resolve this issue on the basis of the history and purpose of section 8(f), rather than on the basis of the 1980 Act, which did not refer specifically to prehire agreements at all. Accordingly, we turn to the merits of Overhead Door's claim that its obligations under the prehire agreements are not enforceable.

III. Enforceability of Prehire Agreements

A. *Legislative History of Section 8(f)*

The general rule under the NLRA is that an employer commits an unfair labor practice by dealing with a union that does not have the support of a majority of workers.[20] The underlying policy is to protect employee freedom of choice. "There could be no clearer abridgment of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity" than to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." [21]

Section 8(f) provides an exception to this rule for employers in the construction industry. This court recently described the congressional motivation for enacting this exception:

> Section 8(f) was enacted as part of the 1959 amendments to the National Labor Relations Act. The

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ing). In the case of prehire agreements, however, it is clear that preventing an employer from asserting their unenforceability in defense of a trust fund suit effectively makes them enforceable in that context.

We also note that none of the circuit courts to address the 8(f) issue in the past two years have relied on the 1980 Act. *See* p. 17 *infra*.

[20] *See International Ladies' Garment Workers Union* v. *NLRB*, 366 U.S. 731, 737-38 (1961).

[21] *Id.* at 737.

provision was added due to the peculiar nature of employment in the building and construction industry. As described in the Senate Report concerning § 8(f):

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on various stages of construction.

S. REP. NO. 187, 86th Cong., 1st Sess. 27 (1959), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (LEGISLATIVE HISTORY), at 423 (1959). As a result of these peculiarities, special arrangements became common in the construction industry. As described by the Senate Report:

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated.

Id. at 28; I LEGISLATIVE HISTORY at 424. The Report noted that these agreements have special advantages for employers as well as workers:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the em-

> ployer must be able to have available a supply of skilled craftsmen ready for quick referral.
>
> *Id.*
>
> For these reasons and since the practice of signing such agreements was "not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired," *id.*, Congress added § 8(f) to the Act. That provision authorizes employers in the construction industry to enter into comprehensive agreements with labor organizations that have not established majority status in the manner provided by § 9 of the Act. As the Senate Report bluntly concluded, "[r]epresentation elections in a large segment of the industry *are not feasible* to demonstrate such majority status due to the short periods of actual employment by specific employers." *Id.* at 55; I LEGISLATIVE HISTORY at 451 (emphasis supplied).
>
> Congress thus expressly recognized that § 9(a) collective bargaining relationships are often not feasible in the construction industry. Due to the occasional nature of employment in that industry, unions and employers may enter "prehire" agreements that stabilize employment conditions in a particular geographic area over an extended period of time.[22]

By enacting this section, however, Congress did not eliminate its concern for both employer and employee freedom of choice. As the Supreme Court has held,"Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow

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[22] *Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859, 874 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

exception being established to the majority principle." [23] Moreover, until the union gains full recognition, either the employees or the employer may petition the Board for a representation election.[24]

B. *The Supreme Court's* Iron Workers *Decision*

In *NLRB* v. *Local 103, International Association of Bridge, Structural & Ornamental Iron Workers (Iron Workers)*,[25] the Supreme Court upheld a National Labor Relations Board (NLRB) determination that a union committed an unfair labor practice under section 8(b)(7)(C) by picketing to enforce a prehire agreement. An employer who had signed a prehire agreement established a separate company for the purpose of doing business with nonunion employees. The union considered this a violation of the agreement's multiemployer understanding, and it picketed at one jobsite for more than thirty days, the time period triggering applicability of section 8(b)(7)(C)'s prohibition of recognitional picketing.[26] The Board found that the picketing was unlawful because it was intended not merely to enforce the terms of the agreement but also to force the employer to recognize and bargain with the union.

The Supreme Court affirmed, emphasizing the substantial deference it gave to the Board's decision: "We have concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." [27] Although section 8(f) provides an excep-

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[23] *NLRB* v. *Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 348 n.10 (1978).

[24] 29 U.S.C. § 158(f) (1976).

[25] 434 U.S. 335 (1978).

[26] 29 U.S.C. § 158(b)(7)(C) (1976).

[27] 434 U.S. at 341. *See also id.* at 350.

tion to the rule regarding majority representation, the exception is narrow. "The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites." [28] Section 8(f) does not expand the employer's duty to bargain with a majority union into a duty "to bargain with a union with which he has executed a prehire agreement but which has failed to win majority support in the covered unit." [29] To hold otherwise would contravene the clearly expressed congressional policy of maintaining the employees' freedom to choose their own representative. Accordingly, until majority support is gained, "the prehire agreement is voidable and does not have the same stature as a collective-bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer." [30]

C. *Retrospective Enforcement of Prehire Agreements*

The three Acceptance Agreements called for Overhead Door to make specified contributions to the Funds on behalf of covered employees. The parties agree that these were prehire agreements. The sole issue before us, therefore, is whether Overhead Door is liable for the unpaid contributions even though the union never attained majority status during the ten-year span of the agreements. Overhead Door bases its argument for unenforceability on language in *Iron Workers* stating that a prehire agreement is merely a "'preliminary step'" and that "[t]he employer's duty to bargain and honor the contract is contingent on the union's attaining majority sup-

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[28] *Id.* at 345.

[29] *Id.* at 346.

[30] *Id.* at 341.

port." [31] The Funds, on the other hand, rely on the Court's statement that the agreements are "voidable," [32] interpreting this to mean that the contract is enforceable until it is voided by either party.

We hold that section 8(f) agreements are enforceable in a breach of contract action for the period from the date the agreement was made until the date when either party manifests its intent to void the agreement. We emphasize the limitations on this holding. Until the minority union obtains support of a majority of employees, the prehire agreement is not prospectively binding. Either party to the agreement may void it. While the agreement remains in effect, however, it must be observed by the parties.

This holding is based on our understanding of the congressional purposes underlying the exception for prehire agreements. As the legislative history of section 8(f) indicates, Congress recognized that the normal collective bargaining paradigm did not work in the construction industry. Permitting a minority union to make an agreement with an employer, often before the employer has hired any employees for a particular job, has many benefits for both parties. Employees gain the benefits of collective bargaining where it might otherwise be impractical. At the same time, they are free to

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[31] *Id.* at 345. Overhead Door also cites the Court's statement that a previous decision, *Retail Clerks Int'l Ass'n, Locals 128 & 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), could be reconciled with a holding "that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." 434 U.S. at 352. In *Lion Dry Goods* the Court held that § 301 of the Labor Management Relations Act confers jurisdiction on the federal courts to hear suits based on § 8(f) contracts. All *Iron Workers* added was that this holding did not compel the conclusion that § 8(f) agreements are enforceable, since the jurisdictional question differs from the enforceability question. Nothing further can be read into *Iron Workers*.

[32] *Iron Workers*, 434 U.S. at 341.

call for a representation election if dissatisfied with the prehire agreement or any other aspect of the minority union's involvement. Employers are free to abstain from entering section 8(f) agreements, but when they do make them they are able to set labor costs in advance, to ensure a ready supply of workers, and to gain a measure of labor peace. In sum, both parties are able to enjoy the benefits of a stable employment relationship, while retaining freedom to alter that relationship.[33]

This analysis demonstrates that a prehire agreement serves two important purposes. First, it matures into a fully effective collective bargaining agreement once the union represents a majority of the workers. Second, it serves as the terms of employment for the workers hired by the consenting employer. It is indisputable that Congress intended the second purpose; otherwise, section 8(f) would not permit prehire agreements ever to be followed prior to the union's demonstration of its majority status. And given Congress' recognition that in many instances a union may find it difficult to establish its majority position, section 8(f) must contemplate that many prehire agreements will govern for a considerable period of time.[34]

In our view, recognition of these separate purposes compels our conclusion that prehire agreements are enforceable retrospectively, but not prospectively. Congress intended that prehire agreements not have the same status as contracts between an employer and a recognized majority union. To hold that an employer is prospectively bound to follow section 8(f) contracts would

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[33] *See* pp. 10-11 *supra*.

[34] "Due to the occasional nature of employment in [the construction] industry, unions and employers may enter 'prehire' agreements that stabilize employment conditions in a particular geographic area over an extended period of time." *Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859, 874 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

contravene the principle that adherence to them be *voluntary*.[35] Moreover, it would effectively force the employer to recognize and bargain with a union before the union had proved its majority status. This result would violate the policy of employee free choice which was emphasized in the *Iron Workers* decision.[36]

Retrospective enforcement is a different matter. The prehire agreement sets the compensation for services rendered to the employer while the agreement remains in effect. We do not believe Congress intended to permit an employer to accept labor services under a prehire agreement, refuse to pay wages, and yet be immune from suit to recover the wages on the ground that the contract is unenforceable. Contributions to union welfare funds are as much a part of an employee's compensation as his hourly wages, and an employer should not be free to withhold either one.

This requirement is fully consistent with the Supreme Court's emphasis on employer and employee freedom of choice. We disagree with Overhead Door's contention that the "real issue" in this case is whether a minority union can force an employer to bargain with it.[37] There is no sense in which the Funds' contract action has a forbidden recognitional purpose, as did the picketing in *Iron Workers*. At any time the employer may avoid all future dealings with a minority union by simply declaring the prehire agreement void. Once this intention is manifested, the employer's obligation to follow the agreement ceases.[38] It remains liable, however, for obli-

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[35] *See Iron Workers*, 434 U.S. at 347-48 & n.10.

[36] *See id.* at 346-49.

[37] Brief for Respondent at 12.

[38] We need not decide what specific act an employer must take to demonstrate its repudiation of a prehire agreement. The essential point is that the union and employees be put on notice that the contract is voided. It is clear on the record in this case that Over-

gations accrued while the agreement was in effect. Employees thus receive full compensation for services rendered, yet their freedom to choose their own bargaining representative is unimpaired. The minority union gains no added ability to ignore employee wishes, and the employer is under no greater obligation to deal with the union.

We note that of four circuit courts to rule on this issue, the Eighth, Ninth, and Tenth Circuits have held that union trust funds may recover unpaid contributions due under a prehire agreement;[39] only the Fifth Circuit has ruled to the contrary.[40] The reasoning of very recent decisions of the Eighth and Ninth Circuits is the same as we announce today.[41] We note that the Tenth Circuit, relying on an earlier Eighth Circuit decision, has suggested that prehire agreements are both retrospectively

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head Door did not manifest the necessary intent. On the contrary, it signed new agreements each time it was asked to do so.

[39] *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *W. C. James, Inc.* v. *Oil, Chem. & Atomic Workers Int'l Union*, 646 F.2d 1292 (8th Cir. 1981); *Todd* v. *Jim McNeff, Inc.*, 667 F.2d 800 (9th Cir. 1982); *Western Wash. Laborers-Employers Health & Sec. Trust Fund* v. *McDowell*, No. 80-3024 (9th Cir. 2 Mar. 1982); *New Mexico Dist. Council of Carpenters* v. *Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981). *See also Trustees of Atlanta Iron Workers Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (N.D. Ga. 1981); *Florida Marble Polishers Health & Welfare Trust Fund* v. *Megahee*, 102 L.R.R.M. (BNA) 2740 (M.D. Fla. 1979); *Eastern Dist. Council of United Bhd. of Carpenters* v. *Blake Constr. Co.*, 457 F. Supp. 825 (E.D. Va. 1978).

[40] *Baton Rouge Bldg. & Constr. Trades Council* v. *E.C. Schafer Constr. Co.*, 657 F.2d 806 (5th Cir. 1981). *See also Lail* v. *C&R Constr., Inc.*, No. 1-80-52 (E.D. Tenn. 26 Jan. 1981); *Vermeer* v. *Aloha Contractors, Inc.*, 90 Lab. Cas. (CCH) ¶ 12,466 (D. Or. 1980); *Paddack* v. *Clark*, 90 Lab. Cas. (CCH) ¶ 12,494 (D. Or. 1980).

[41] *See W.C. James, Inc.* v. *Oil, Chem. & Atomic Workers Int'l Union*, 646 F.2d 1292, 1295 & n.4 (8th Cir. 1981); *Todd* v. *Jim McNeff, Inc.*, 667 F.2d 800, 802-04 (9th Cir. 1982).

and prospectively enforceable in a contract action.[42] This reads *Iron Workers* narrowly as being limited to unfair labor practice cases, a reading with which we disagree. The Supreme Court was careful to state that the section 8(f) exception is limited to ensure that adherence be voluntary on the part of the employer. Essential to this principle, we believe, is the employer's ability to repudiate a prehire agreement while the union remains in a minority position.

We note also that a recent decision by the NLRB provides strong support for our determination that *Iron Workers* hinged on the Board's finding that the picketing there was conducted for a recognitional purpose. In April 1981 the Board held that a union which picketed for more than thirty days for the announced purpose of forcing an employer to make fringe benefit payments pursuant to a prehire agreement did not violate section 8(b)(7)(C). After reviewing the factual situation as a whole, the NLRB determined that "the sole purpose of the picketing" was to compel the employer to make the payments.[43] The Board noted: "Our decision is . . . consistent with the concept that relationships protected by Section 8(f) must be voluntary. The Respondent's picketing was limited to requiring the Charging Party to meet the obligations which allegedly had accrued under an 8(f) contract and was not directed at forcing continuation of the 8(f) relationship." [44] *Iron Workers* was

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[42] *New Mexico Dist. Council of Carpenters* v. *Mayhew Co.*, 664 F.2d 215, 219-20 (10th Cir. 1981) (relying on *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128, 1133-34 (8th Cir. 1981)). The broad holding in *Associated Wrecking* was cut back in *W.C. James, Inc.* v. *Oil, Chem. & Atomic Workers Int'l Union*, 646 F.2d 1292, 1295 & n.4 (8th Cir. 1981), which held that a prehire agreement was not prospectively enforceable.

[43] *International Union of Operating Engineers, Local 150*, 255 N.L.R.B. No. 83, at 16 (6 Apr. 1981).

[44] *Id.* at 17.

distinguished: "Unlike that situation, the 'enforcement' sought by the Respondent's picketing was payment of an alleged past obligation under the 8(f) contract and did not require current application of the contract." [45]

The NLRB's reasoning applies as well to the case at hand. The Funds' lawsuit is limited to seeking payment by Overhead Door of unpaid contributions allegedly due under prehire agreements *which were never repudiated.* In no way can the suit force continuation of a section 8(f) relationship, nor can it impair employer or employee freedom of choice. Since *Iron Workers* itself rested substantially on deference to the NLRB's construction of the statute, this recent decision is entitled to due consideration. We find that our reasoning accords with that of the Board.

IV. Conclusion

On remand the district court will need to consider two separate claims. The first is that Overhead Door's payments for its three union employees were based on an insufficient number of hours worked. This dispute turns on whether two of the union employees were engaged in carpentry work within the meaning of the agreements. The second is that contributions are owed for hours worked by nonunion employees. We hold that Overhead Door was obliged to make these payments. The district court should resolve any further disputes about which employees and hours were covered, and should consider any remaining defenses Overhead Door might legitimately raise, such as the relevant statute of limitations.

Reversed and remanded.

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[45] *Id.* at 19.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1501

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Appellants

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON

Before: Robinson, Chief Judge, Thornberry,* Senior Circuit Judge for the Fifth Circuit, and Wilkey, Circuit Judge.

ORDER

IT IS ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:

GEORGE A. FISHER
Clerk

[Filed June 15, 1982]

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* Sitting by designation pursuant to 23 U.S.C. § 294(d).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0097

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Plaintiffs,

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON,
Defendant.

JUDGMENT

Upon consideration of plaintiffs' and defendant's motions for summary judgment, and for the reasons given in the memorandum opinion filed this date, it is this 22nd day of April, 1980,

ORDERED, that defendant's motion for summary judgment be and hereby is granted; and it is

FURTHER ORDERED, that judgment be and hereby is entered in favor of defendant Overhead Door Co., of Metropolitan Washington and against plaintiffs Washington Area Carpenters' Welfare Fund, Washington Area Carpenters' Pension and Retirement Trust Fund, Washington Area Carpenters' Apprenticeship Plan, and Washington Area Carpenters' Trust Funds; and it is

FURTHER ORDERED, that the above-entitled action be and hereby is dismissed with prejudice.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

[Filed April 22, 1980]

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0097

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Plaintiffs,

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON,
Defendant.

MEMORANDUM OPINION

This case comes before the Court on cross-motions for summary judgment. Plaintiffs [Funds] are various pension, welfare, and trust funds for a local carpenters' union. They bring this action under § 502(f) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, and § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, to compel defendant, Overhead Door Co. of Metropolitan Washington [Overhead] to allow Funds to audit its records relating to employee contributions and to recover unpaid contributions that Overhead allegedly was required to make pursuant to an agreement with the carpenters' union. Funds also seek auditor's fees, attorney fees, costs and liquidated damages provided for in the agreement. The union itself is not a party to this action.

The original collective bargaining agreement between Overhead and the Carpenters' District Council of Washington, D.C. in October 1979 was executed at a job site where two of Overhead's employees were working. According to Overhead, the union's representative told Overhead's president that he had to sign the agreement if the employees were to finish the job. Overhead acknowl-

edges that these employees soon after joined the union, and that one of its thirteen other employees at the time was already a member of the union. Pursuant to that agreement, since October 1979 Overhead has deducted union dues from the wages of these three employees and has paid contributions on their hours. Overhead's president states that he currently has 21 employees doing carpentry work, and that of the three employees referred to above, two have not worked as carpenters in over 10 years. He does, however, admit to re-signing the agreement in 1972 and 1976.

Funds have commissioned an audit of the payroll records of the three employees for whom contributions were made; this audit concludes that Overhead owes contributions approximating $14,000. Overhead disputes the accuracy of the audit in that it included hours worked by the employees but not as carpenters. It has refused to allow Funds to audit its records relating to other employees.

The parties have treated this contract as a "pre-hire" agreement, a type of agreement peculiar to the construction industry that may be entered into before all employees to be subject to it are hired, and before the union's membership encompasses a majority of the employees. Labor-Management Relations Act § 8(f), 29 U.S.C. § 158(f). This exception to the typical requirement that a union demonstrate majority support before it may bargain with management is an accommodation to the "transitory nature of the employer-employee relationship in [the construction] industry." *N.L.R.B. v. Irvin*, 475 F.2d 1265 (3rd Cir. 1973). In time the union must gain majority support if it expects to represent the employees, because only representatives of the majority may bargain with the employer. Act § 9(a), 29 U.S.C. § 159(a). Here, neither the union nor Overhead have petitioned for a representation election under 29 U.S.C. § 159(c), or taken any other steps to determine whether the union has achieved majority support.

Overhead contends that since Funds have not demonstrated majority support, the pre-hire agreement and the agreement within it to make contributions are not enforceable. Funds argue that the pre-hire agreement is enforceable as long as majority support has not been disproven, and that even if the pre-hire agreement is found to be unenforceable, Overhead still must make contributions for all employees to the trust funds, under the rule that an employer may not assert any defenses it has to a union contract against a trust fund.

I. *Enforceability of the Pre-Hire Agreement*

The parties agree that resolution of this issue turns on the proper application and interpretation of *N.L.R.B. v. Iron Workers Local 103*, 434 U.S. 335 (1978). In that case, the Supreme Court held that where a union which admittedly lacked majority support attempted to enforce its pre-hire agreement by picketing, it was guilty of the unfair labor practice of picketing for recognitional purposes, a violation of 29 U.S.C. § 158(b)(7). In arriving at this result, the Court affirmed the decision of the National Labor Relations Board, noting that

> • • • Under the Board's view of § 8(f), a pre-hire agreement does not entitle a minority union to be treated as the majority representative until and unless it attains majority support in the relevant unit. Until that time the prehire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer.

Iron Workers, 434 U.S. at 341.

The Court "concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language . . . ." *Id.*

Overhead relies on *Iron Workers* for the proposition that the pre-hire agreement is unenforceable unless ma-

jority support is proven by Funds or the union. Funds asserts that the *Iron Workers* case is limited to the situation of attempts to enforce pre-hire agreements by picketing. This interpretation was espoused in *Eastern District Council v. Blake Construction Co.*, 457 F. Supp. 825 (E.D. Va. 1978). The court in that case held that a pre-hire agreement, although terminable by either party at will, was enforceable, and was not in fact terminated until the employer gave reasonable notice of his intent to terminate. The employer's failure to comply with the agreement was held to constitute conduct manifesting such intent. *Id.* at 830. The court distinguished *Iron Workers*: ". . . that case dealt with the question of whether certain picketing was an unlawful labor practice and is not determinative on the facts of this case." *Id.* at 829. Relying on *Blake*, Funds argue that since Overhead has not manifested its intent to withdraw from the contract or shown that the union lacks majority support, but has signed subsequent agreements renewing the original one, it remains obligated to make contributions.

The *Blake* decision, however, was disapproved of in a recent well-reasoned decision of the United States District Court for the District of Nebraska, which relied extensively on *Iron Workers* to resolve a dispute very similar to the one at bar. The case of *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Associated Wrecking Co.*, Civ. No. 77-0-248 (D. Neb. Feb. 15, 1980), like the instant action, involved a suit to recover sums the defendant allegedly owed to the plaintiff trust funds pursuant to a pre-hire agreement. In that case, as here, the defendant contended that the union never obtained majority support and that the agreement, therefore, was unenforceable. The plaintiffs apparently offered no evidence to the contrary.

The court in *Associated Wrecking* interpreted the Board's holding in *Iron Workers* as "that a § 8(f) agreement is 'noneffective,' and thus unenforceable if the

union never thereafter obtains majority status, and that, therefore, the employer may freely decide to ignore it until such time as majority status is obtained." *Associated Wrecking, Daily Labor Report* (BNA, Mar. 12, 1980), at D-2. It read the Supreme Court's holding in that case to mean "that a § 8(f) agreement was unenforceable until such time as the union achieves majority status." *Id.*

It is clear that all § 8(f) does is to allow employers of construction workers willing to enter into agreements with uncertified unions to do so without being guilty of unfair labor practices. Legislative history bears this out:

> It was not the intention of the committee to require by Section [8(f)] the making of prehire agreements, but, rather, to permit them, nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements.

104 Cong. Rec. 11308 (July 16, 1958) (remarks of Sen. John F. Kennedy).

A pre-hire agreement "is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *Ruttman Construction Co.*, 191 N.L.R.B. 701, 702 (1971). It "cannot be enforced, and can be unilaterally ignored or abrogated by the employer,[1] until such time as the union achieves majority status in the relevant unit." *Associated Wrecking*, at P. D-2. "The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites." *Iron Workers*, at 345.

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[1] Presumably, no matter how many times it is re-executed.

While the union here could at any time petition the Board for a representation election, it has not chosen to do so. With no evidence of support except the acknowledgment that three of Overhead's employees (including two no longer doing carpentry) at one time joined the union, Funds in effect are asking the Court to presume that the union has achieved majority support and, consequently, that the agreement is valid. The Court cannot traverse that bramble path without falling into a bottomless mire of speculation. It is abundantly clear that support of a majority of workers at each construction site is a crucial element of enforceability, to be affirmatively demonstrated by the party bring suit.[2] Funds have not satisfied their burden.

II. *Defenses to the Union Contract Applied to the Trust Fund Agreement*

Funds ask the Court to hold as a matter of law that when the trustees of a Taft-Hartley fund such as those involved here sue an employer for unpaid contributions, the employer may not assert any defenses it has against the collective bargaining agreement. They emphasize that the union is not a party to the suit and note in support of their argument various cases in which the courts have refused to allow employers to assert such defenses in suits brought by trust funds. Yet none of the cases cited by Funds involved a pre-hire agreement or the issue of majority support. *See Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) (union breached contract by striking);

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[2] The fact that the union is not a party to this suit does not relieve Funds of the burden to prove majority support. It is *proof* of majority support, not a representation election *per se*, that is required. While Funds may not be able to petition for a § 9(a) election, they are not precluded from presenting other forms of proof.

Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978) (union allegedly violated Sherman Anti-Trust Act); *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied* 390 U.S. 947 (1968) (antitrust violations and illegal "hot cargo" provisions in agreement alleged). These cases involved collateral defenses to enforcement of the agreements. The defense in the instant case, on the other hand, concerns the validity of the very agreement that sought to establish a contractual relationship between Funds and Overhead.

The laudable policy considerations behind the decisions disallowing contractual defenses in trust fund cases include guaranteeing "hard working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment" and foreclosing the "possibility that an employer will surprise its employees at a late date that it was not legally bound to provide for contingencies that may afflict them or their families in the future." *Huge v. Long's Hauling Co.*, at 465. These very important concerns, however, are absent in a case such as the instant one involving, as it does, a voidable agreement upon which no reasonable expectations of future benefits may be based. Certainly those employees who have never received benefits from the agreement can expect no more than the status quo.

The *Iron Workers* case teaches that majority support is a crucial element of an enforceable pre-hire agreement. Such support must be established affirmatively by the party suing to enforce the agreement. *Cf. Associated Wrecking, supra.* As majority support has not been shown, the agreement is unenforceable against Overhead. Consequently, Funds have no claim for insufficient contributions with respect to the three employees on whose behalf some contributions were made, nor any right to examine Overhead's payroll records for other employees.

In light of the foregoing, there being [as the parties agree] no genuine issues of material fact, Overhead is entitled to summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56.

Judgment is entered for the defendant, Overhead Door Co. of Metropolitan Washington, in accordance with the accompanying Order.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

Date: April 22, 1980

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0097

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Plaintiffs,

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON
Defendant.

AMENDMENT TO OPINION

Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, it is by the Court this 5th day of May, 1980,

ORDERED, that the Memorandum Opinion in this case entered on April 22, 1980 be corrected as follows: in the second paragraph of the first page of the Opinion, the two references to "October 1979" shall be changed to read "October 1969".

Otherwise the text of the Opinion in this case contains no clerical errors, and is not affected by this Order.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

[Filed May 5, 1980]

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

CA 79-0097

No. 80-1501

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*, *Appellants*

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON

Appeal from the United States District Court for the District of Columbia

Before: Robinson, Chief Judge, Homer Thornberry,* Senior Circuit Judge for the Fifth Circuit, and Wilkey, Circuit Judge

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 15, 1982
Opinion for the Court filed by Circuit Judge Wilkey.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 79-0097

No. 80-1501

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*, *Appellants*

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON

Before: Robinson, Chief Judge; Wilkey, Circuit Judge; and Thornberry *, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit

ORDER

On consideration of appellee's petition for rehearing, filed July 12, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

[Filed Aug. 30, 1982]

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* Sitting by designation pursuant to Title 28 U.S.C. & 294(d).

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0097

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Plaintiffs,

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON,
Defendant.

AFFIDAVIT OF RICHARD F. AYRES

Commonwealth of Virginia,
County of Fairfax
) ss:

To Wit:

Richard F. Ayres, being duly sworn, deposes and states:

(1) My name is Richard F. Ayres. Since 1962 I have been the President of the Overhead Door Company of Metropolitan Washington.

(2) The Overhead Door Company of Metropolitan Washington was chartered under the laws of the District of Columbia in 1927 and originally had its principal office in Washington, D.C. However, during the time that I have been President, the company's principal office was located in Alexandria, Virginia until 1974 and thereafter has been located in Newington, Virginia. Throughout this period, our only other office has been located in Harrisonburg, Virginia.

(3) The exclusive business of my company is to install and service the products manufactured by the Overhead Door Company of Pennsylvania and the Overhead Door Corporation (an Indiana corporation) under two franchise agreements. Under the first franchise agreement, attached as Exhibit A to this affidavit, my company's franchise territory includes the counties of Arlington, Fairfax, Prince William, and Loudon in Virginia; the counties of Montgomery, Prince Georges, Charles, and St. Mary's in Maryland; and the District of Columbia. Under the second franchise agreement, attached as Exhibit B to this affidavit, my company's franchise territory includes 16 additional counties in Virginia and 4 counties in West Virginia. Our projects under these franchise agreements include commercial and residential installations, and most of our work has been in Virginia.

(4) Many years ago, the Overhead Door Company of Metropolitan Washington had a contract with the Carpenters' Union, but the contract expired and was not renewed. From the time I became President of the company in 1962 until October, 1969, I had never signed a collective bargaining agreement covering any of my employees. However, in October, 1969, two of my employees were working on a job in Laurel, Maryland in which I was a subcontractor to the Charles Tompkins Company. A representative of the Carpenters' Union, whose name I think was James S. Merkle, came to the job site and told my men that I would have to sign a contract with the Carpenters' Union in order to finish the job. I signed the contract, and my two employees on that job joined the Union. The names of those employees are Daniel O. Jacobs and Jimmie Lantz. At that time I had 15 employees doing carpentry work, one of whom, Robert Taylor, belonged to the Carpenters' Union. The Union did not contend that it represented a majority of these employees.

(5) Since October, 1969, I have deducted union dues from the wages of Taylor, Jacobs, and Lantz and I have

paid contributions on their hours to the Carpenters. I have continued to do so despite the fact that Taylor has not worked as a carpenter for the last 10 years and the fact that Jacobs has been my installation superintendent for the last 10 years. However, I have never applied the Carpenters' contract to any of the other employees or to any job subsequent to the Charles Tompkins' job in 1969. I now have 21 employees doing carpentry work.

(6) Whenever the Carpenters' Union has sent me a new contract to sign, I have signed it. I recognize the contract documents attached as Exhibit F to the plaintiffs' motion for summary judgment and I acknowledge that I signed the pages at the end of Exhibit F in 1969, 1972, and 1976. I have never seen the Welfare Fund, Apprenticeship Plan, or Pension Fund documents attached as Exhibits C, D and E to the plaintiffs' motion for summary judgment and I cannot say that they are authentic.

(7) I acknowledge that I am behind in my payments for contributions for hours worked by Taylor, Jacobs, and Lantz in the amount of $13,956.89, if the standard of measurement is all hours worked, rather than all non-supervisory hours worked at the carpentry trade.

/s/ Richard F. Ayres
RICHARD F. AYRES

Subscribed and sworn to before me this 16 day of May, 1979.

/s/ [Illegible]
Notary Public

My Commission Expires:

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0097

WASHINGTON AREA CARPENTERS' WELFARD FUND., *et al.*,
Plaintiffs,

v.

OVERHEAD DOOR CO. OF METROPOLITAN WASHINGTON,
Defendant.

AFFIDAVIT OF RICHARD F. AYRES

Commonwealth of Virginia)
) ss:
County of Fairfax)

To Wit:

Richard F. Ayres, being duly sworn, deposes and states:

(1) This affidavit supplements my affidavit of May 16, 1979.

(2) Since I have been President of the Overhead Door Company of Metropolitan Washington, the Carpenters' Union has never represented any of my employees other than Taylor, Jacobs, and Lantz. Moreover, the Union has represented Jacobs and Lantz only because it told me in October, 1969, that it would kick me off the job unless I signed a contract and made Jacobs and Lantz join the Union, which I did.

(3) Since I have been President of the Overhead Door Company of Metropolitan Washington, no election has ever been held among my employees.

(4) Since I have been President of the Overhead Door Company of Metropolitan Washington, I have never paid contributions to the Carpenters for any employees other than Taylor, Jacobs, and Lantz, and none of my other employees has ever made a claim for benefits from the Carpenters.

/s/ Richard F. Ayres
RICHARD F. AYRES

Subscribed and sworn to before me this 4 day of June, 1979.

/s/ [Illegible]
Notary Public

My Commission Expires: 8-26-80.

APPENDIX J

29 U.S.C. § 158(f). National Labor Relations Act.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organizations an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualification for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to Section (a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 159(c) or 159(e) of this title.

29 U.S.C. § 185(a) Labor Management Relations Act.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 1132(f). Employee Retirement Income Security Act.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OVERHEAD DOOR COMPANY OF METROPOLITAN WASHINGTON,
Petitioner,

v.

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH SEMO *
SEIFMAN, SEMO & SLEVIN, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Respondents

Of Counsel:

JOSEPH M. STONE
1629 K Street, N.W.
Washington, D.C. 20006
(202) 296-8175

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, absent a showing that the union represents a majority of the employer's employees in the appropriate bargaining unit, a prehire agreement authorized by Section 8(f) of the National Labor Relations Act is enforceable in a suit brought by employee benefit plans against an employer in the construction industry, until such time as a party to the agreement manifests its intent to void the agreement.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Statement of the Case	1
Argument	3
Conclusion	4

TABLE OF AUTHORITIES

CASES	Page
Carpenters Local Union No. 1846 v. *Pratt Farnsworth, Inc.*, No. 81-3222 (5th Cir. decided Nov. 4, 1982)	3
Jim McNeff, Inc. v. *Todd*, 667 F.2d 800 (9th Cir.), *cert. granted*, 102 S.Ct. 3508 (1982) (No. 81-2150)	2
New Mexico District Council of Carpenters v. *Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981)	3
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982)	2, 3
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C 1981), *rev'd*, 681 F.2d 1 (D.C. Cir. 1982)	2
STATUTES	
29 U.S.C. § 158(f)	2

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents, Washington Area Carpenters' Welfare Fund, Washington Area Carpenters' Pension and Retirement Trust Fund, Washington Area Carpenters' Apprenticeship Plan, and Washingon Area Carpenters' Trust Funds (herein together "Respondent Funds") pray that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit; in the alternative, Respondent Funds submit that the writ of certiorari should only issue with respect to the narrower question identified by them.

STATEMENT OF THE CASE

The issue presented in this case—whether a prehire agreement is enforceable by employee benefit plans absent a showing that the union signatory to the relevant collective bargaining agreement is the majority representa-

tive of the employer's employees prior to the manifestation by any party of its intent to void and repudiate the agreement—as Petitioner asserts, is virtually identical to the issue which this Court has agreed to review in *Jim McNeff, Inc.* v. *Todd, cert. granted,* 102 S.Ct. 3508 (1982) (No. 81-2150) ("McNeff"). The facts also are similar.

Petitioner Overhead Door Company of Metropolitan Washington (Petitioner Overhead Door), an employer in the construction industry, executed a collective bargaining agreement with the Carpenters District Council of Washington, D.C. (Carpenters Union), a labor organization, in 1969. Thereafter, Petitioner Overhead Door entered into successive collective bargaining agreements in 1972 and 1976. The litigants[1] all agree that each agreement was a "prehire" agreement as that term is commonly known in the construction industry, authorized by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f).

Each of the agreements between the Carpenters Union and Petitioner Overhead Door require that contributions be made to Respondent Funds. Prior to January 9, 1979, the date the Respondent Funds commenced this action, the Petitioner Overhead Door neither manifested its intent to void nor repudiate the agreement. *See Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.,* 681 F.2d 1, 10, fn. 38 (D.C. Cir. 1982).

On April 22, 1980, the District Court granted summary judgment for Petitioner Overhead Door. *See Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.,* 488 F. Supp. 418, *rev'd* 681 F.2d 1 (D.C. Cir. 1982). On June 15, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's entry of summary judgment, ruling that prehire agreements were enforceable in a breach of contract action until the date when either party manifests its intent to void the agreement. *See Washington Area Carpenters'*

[1] The Carpenters Union has never been a party to this litigation.

Welfare Fund v. *Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982).

ARGUMENT

The decision of the Court of Appeals of which review is sought in this case follows the decisions rendered by the Eighth, Ninth and Tenth Circuits' holding that employee benefit plans may recover unpaid contributions due under a prehire agreement until such time as the contract is voided.[2] Only the Fifth Circuit has held to the contrary, and, their conflict with other circuits has been recognized. *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, No. 81-3222 (5th Cir. decided Nov. 4, 1982). Consequently, as to the issue of enforcing a prehire agreement absent proof of majority representation of the relevant employees in the appropriate unit until such time as a party to the agreement manifests its intent to void the agreement, substantial agreement does exist among the Circuit Courts. Since a prevailing standard has been established, the need to review this question is less compelling.

Moreover, at issue in this case is the very limited question of whether employee benefit plans in the construction industry as third party beneficiaries of prehire agreements may enforce contributions required under Section 8(f) agreements, absent a showing that the union represents a majority of the employer's employees in the appropriate bargaining unit, until a party to the agreement repudiates the agreement. The question suggested by

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[2] The Tenth Circuit has further held that, as a matter of contract interpretation, prehire agreements may be retrospectively and prospectively enforceable. *New Mexico District Council of Carpenters* v. *Mayhew Co.*, 664 F.2d 215, 219-20 (10th Cir. 1981) As the United States Court of Appeals for the District of Columbia Circuit indicated, the *Mayhew* court suggested, but did not hold, that as a matter of labor law prehire agreements are both prospectively and retroactively enforceable. *See Washington Area Carpenters' Welfare Fund*, 681 F.2d at 9.

Petitioner Overhead Door goes beyond the narrow ruling of the Court of Appeals.

Petitioner Overhead Door's question raises issues not argued below including whether the agreement is enforceable prospectively and what particular conduct is necessary to repudiate the agreement. Consequently, a writ of certiorari, if granted, should be limited to the issue actually ruled upon by the Circuit Court below.

CONCLUSION

For the foregoing reasons, Respondent Funds move that this Court deny the Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, or, in the alternative, issue such Writ only with respect to the more limited question set forth herein.

Respectfully submitted,

JOSEPH SEMO *
SEIFMAN, SEMO & SLEVIN, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Respondents

Of Counsel:

JOSEPH M. STONE
1629 K Street, N.W.
Washington, D.C. 20006
(202) 296-8175

* Counsel of Record